



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: NOVEMBER 22, 2022

IN THE MATTER OF:

Appeal Board No. 625338

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the employer. By decision filed August 10, 2022 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked as the employer's director of business operations for about one year until May 18, 2022. In this role, the claimant was responsible for the day-to-day operations of the business. On May 17, 2022, the company president found the residue of a substance on the vanity in the company bathroom that he believed was cocaine. As a result, he watched the security camera footage and saw that the claimant had used the bathroom some 12 times in a four-hour period; he also saw her carry with her into the bathroom a cellophane bag.

The following day, the president confronted the claimant at which time the claimant admitted doing cocaine while at work. Although the claimant's drug use at work violated the employer's policy, the president offered the claimant an additional two weeks of work so that she could find new employment and he could find a replacement. However, the claimant did not report to work in the days that followed. The president hired a replacement after about four workdays. Upon doing so, he advised the claimant that she was terminated.

OPINION: The credible evidence establishes that the claimant was discharged after she used cocaine, an illegal drug, while at work. The employer's uncontroverted testimony establishes that, after the claimant was confronted, she admitted doing cocaine while at work. We do not find that a policy is necessary to place a claimant on notice that engaging in illegal drug use while at work will jeopardize her job. The claimant knew or should have known that such conduct would place her job in jeopardy (see, Appeal Board No. 539923). Cocaine use represents a willful disregard of the standard of conduct an employer has a right to expect and, therefore, constitutes misconduct (see, Matter of Cumberland, 249 AD2d 867 [3d Dept 1998], citing Matter of Bruno, 236 AD2d 730 [3d Dept 1997] and Matter of Gilbert, 232 AD2d 709 [3d Dept 1996]). We do not find it dispositive that the employer offered to allow the claimant to stay on for two weeks so that she could find new employment and the employer could find a replacement. Accordingly, we conclude that the claimant's use of cocaine while at work constitutes misconduct for Unemployment Insurance purposes.

DECISION: The decision of the Administrative Law Judge is reversed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future, is sustained, effective May 18, 2022.

The initial determination, holding the claimant eligible to receive benefits, is overruled.

The claimant is disqualified from receiving benefits, effective May 18, 2022, until the claimant has subsequently worked in employment and earned remuneration at least equal to 5 times the claimant's weekly benefit rate for

all claims filed on or before January 1, 2014, or until the claimant has subsequently worked in employment and earned remuneration at least equal to 10 times the claimant's weekly benefit rate for all claims filed after January 1, 2014. Employment and earnings from non-covered, excluded or self-employment will not count.

The claimant is denied benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER